IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1009

EDWARD P. ZEMPRELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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Gerald C. Paris
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Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Edward P. Zemprelli, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 22, 1976.

OPINION BELOW

The Order and accompanying Opinion of the Court of Appeals for the Third Circuit denying Petitioner's Petition for Writ of Mandamus is appended hereto. (Appendix A, page 1a). It has not yet been reported. There are no other opinions below.

JURISDICTION

The Order of the Court of Appeals for the Third Circuit was entered on December 22, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether a target defendant who is summoned to appear before a Federal Grand Jury is entitled under federal law and under the Federal Constitution to have the assistance of his privately retained attorney in reviewing the transcript of testimony given by the witness to a prior Grand Jury which had investigated the same matters?

2) Whether the Court of Appeals erroneously determined that mandamus was not an available remedy to review the trial court's determination that secrecy requirements precluded it from permitting the witness's attorney to review the transcript of the witness's testimony before a prior Grand Jury?

3) Whether, in such a case, to require the witness, who is an attorney and a State Senator, to put himself in contempt of court solely to trigger the mechanical procedures necessary to obtain review of the trial court's clearly erroneous ruling is not inconsistent with decisions of this Court and with those of Courts of Appeals in other Circuits?

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

The Constitutional provisions and statutes and rules involved are the Fifth Amendment of the United States Constitution, 28 U.S.C. § 1654, F.R. Crim.P. 6(e) and 16(a). They provide in relevant part:

Amendment V of the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 1654:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 91,63 Stat. 103."

F.R.Crim.P. 6(e):

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

F.R.Crim.P. 16(a):

"Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become

known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved."

STATEMENT OF CASE

Petitioner is a prominent attorney of Pittsburgh, Pennsylvania, and a duly-elected member of the Senate of the Commonwealth of Pennsylvania. In December, 1974, petitioner testified before a grand jury in Pittsburgh, Pennsylvania, which is no longer in session. That defunct grand jury returned indictments for perjury against one of petitioner's clients, who was subsequently convicted of perjury before the United States District Court for the Western District of Pennsylvania in October, 1976. During the October trial for perjury, the federal prosecutor asserted to the jury that petitioner had been involved in his client's decision to testify falsely before the 1974 grand jury.

In November 1976, Petitioner was served with a subpoena again to testify before a Grand Jury presently sitting in the Western District of Pennsylvania and investigating substantially similar matters as those concerning which Petitioner had been inter-

rogated on the occasion of his Grand Jury appearance in 1974.[1] Prior to his scheduled appearance before the Grand Jury, Petitioner asked the federal prosecutor to permit him and his attorney to review the transcript of the testimony which Petitioner had given before the Grand Jury in December 1974. When this request was refused, Petitioner applied to the District Court for such relief. After a hearing on November 18, 1976, the Honorable Louis Rosenberg, Judge of the United States District Court for the Western District of Pennsylvania, ruled that although Petitioner was entitled to review the transcript of the testimony he had given before the Grand Jury in December 1974, requirements of secrecy prevented the Court from allowing Petitioner's counsel to

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1/ The federal prosecutor has filed an affidavit of purpose in which he set forth the reasons why Petitioner had been subpoenaed. See Appendix page 5a. This affidavit concedes that the matters concerning which Petitioner would be interrogated before the Grand Jury relate, inter alia, to matters concerning which he has previously testified. The affidavit further concedes that Petitioner is a "potential defendant".

review the transcript.[2] (Appendix C&E, pp. 9a&32a)

Petitioner filed notice of appeal from the ruling of the district court and because of the possibility that it might be determined not to be an appealable order, [3] also filed a Petition for Writ of Mandamus with the Court of Appeals for the Third Circuit. (Appendix D, p.26a) These efforts were taken by Petitioner in an effort to vacate the ruling which prohibits him from having the assistance of counsel in reviewing the transcript of his testimony

2/ The arbitrary and clearly erroneous nature of this ruling is revealed, inter alia, by the fact that the court explicitly allowed Petitioner to make notes concerning his prior testimony and to disclose such notes to his attorney.

3/ The Court of Appeals ruled that the order was not appealable and granted the Government's Motion to Dismiss the appeal. This ruling is the subject of a companion petition for certiorari at No. 76-940.

before the 1974 Grand Jury. On December 22, 1976, the Court of Appeals for the Third Circuit denied the Petition, with a per curiam opinion. (Appendix A, page 1a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH OPINIONS BY THIS COURT

The Order of the Court of Appeals denying Petitioner's Petition for Writ of Mandamus is in direct conflict with the decisions of this Court. A writ of mandamus is appropriately issued when there is usurpation of judicial power or a clear abuse of discretion. Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

The action of the District Court in allowing petitioner to have access to the transcript of his 1974 grand jury testimony, but in holding that considerations of secrecy mandated the court's refusal to allow petitioner's counsel to review the transcript is clearly in excess of the Court's power to impose restrictions on the ground of secrecy as those restrictions are stated in Rule 6(e) of the Federal Rules of Criminal Procedure. After stating the standards applicable to grand jury proceedings, the Rule specifically provides:

> "No obligation of secrecy may be imposed upon any person except in accordance with this Rule."

Once the District Court had properly[4/] determined that the petitioner was entitled to the transcript of his prior grand jury testimony, for the Court to deny petitioner's counsel access to said transcript directly violated this express provision.

The District Court also abused its discretion by issuing an order inconsistent with 28 U.S.C. 1654 which gives a party the right to have the assistance of his counsel in connection with legal proceedings in

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4/ See: 55 Northwestern University Law Review 482 Grand Jury Minutes and the Rule of Secrecy in Federal Litigation (1960); 20 UCLA Law Review 804 Grand Jury Secrecy: Should Witnesses Have Access to Their Grand Jury Testimony as a Matter of Right? (1973); 7 Harvard Civil Rights-Civil Liberties Law Review 432, 490-498 Federal Grand Jury Investigation of Political Dissidents (1972); United States v. Projansky (SDNY 1968) 44 F.R.D. 550 (per Frankel, J.) ("The reasons for concealing Grand Jury testimony have no application where a defendant seeks his own testimony."); In Re Russo, 53 F.R.D. 564 (D.C. Cal. 1971); In Re Menkoff, 349 F.Supp. 154(D.C. R.I. 1972).

the United States Courts. Furthermore, because petitioner is a "prospective defendant", the limitation imposed upon counsel's access to the petitioner's prior grand jury testimony is inconsistent with the goals and purposes of Rule 16(a) of the Federal Rules of Criminal Procedure. See Bursey v. United States 466 F.2d 1059 (9th Cir. 1972).

This Court has emphasized the responsibility of Courts of Appeal to grant mandamus where review of a District Court's Order is necessary to protect Constitutional rights. Beacon Theatres, Inc. v. Westoner, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 470 (1962). Here, the denying of petitioner's counsel access to the prior grand jury testimony has violated petitioner's right under the Fifth Amendment to due process and jeopardizes or threatens to erode his privilege against self-incrimination.

Almost fifty years ago, this Court in Powell v. Alabama, 287 U.S. 45 (1932) recognized that the effective assistance of counsel includes giving such counsel an adequate opportunity to learn the facts on which the effective representation of the party litigant may depend. In Powell, the Court cited with approval the holding of the Supreme Court of

Pennsylvania in the Commonwealth v. O'Keefe, 298 Pa. 169, 173, to the effect that it is vain to guaranty one the right to counsel and to deny counsel any opportunity to acquaint himself with the facts or the law of the case. In Powell, the Court stated, at page 69:

> " . . . If, in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of due process in the constitutional sense." (Emphasis added.)

This Court has reaffirmed this principle, citing the language of Powell v. Alabama, in later cases. See, Chandler v. Fretag, 348 U.S. 3, 9 (1954); Reynolds v. Cochran, 365 U.S. 525 (1961).

In Chandler, the Court stated, at page 9:

> " . . . (Respondent) . . . denies, however, that petitioner had any federal constitutional right to counsel. . . . But that doctrine has no application here. Petitioner did not ask the trial judge to furnish him counsel; rather, he asked for a continuance so that he could obtain his own. The distinction is well established in this court's decisions. . . . (Citations omitted) . . . Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified . . .

* * *

> "A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth . . ."

In Reynolds, the Court suggests, at page 531, to deprive a person of the assistance of counsel who has been privately employed may in fact never be "harmless error" and, in any event, "even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."

The right to have effective, unhindered advice from counsel concerning the Fifth Amendment privilege is firmly grounded in the Constitution. Maness v. Meyers, 419 U.S. 449 (1975). In Maness, the Court ruled that a lawyer could not be held in contempt for advising his client, in a civil proceeding, to invoke the Fifth Amendment privilege. Speaking for the Court, Chief Justice Burger stated at page 466:

> "The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter and who may offer a more objective opinion . . ."

In United States v. Mandujano, ____ U.S. ____, 96 S.Ct. 1768 (1976), Mr. Justice Brennan

points out the need for the effective assistance of counsel as an aid to the effective exercise of the privilege against self-incrimination in Grand Jury proceedings, stating, at 96 S.Ct. 1782:

> "This Court has consistently emphasized and, more importantly, has stood fast to ensure the essential premise underlying our entire system of criminal justice: 'that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.' . . . And the successful maintenance of the adversary system when threatened by these sometimes blatant but often more subtle assaults has had as a core underpinning the vigilance of this Court in jealously guarding the right of every person not to be compelled to be witness against himself. . . .
>
> * * *
>
> "It is in light of this fundamental role of the Fifth Amendment privilege—with a deep 'appreciat[ion of] the breadth and significance of the values that the Fifth Amendment was designed to protect' . . . that the proper scope and treatment of the privilege must be analyzed in the context of the interrogation of a putative defendant before a grand jury. . . ."

Mr. Justice Brennan continued, at page 1785:

> "It cannot be gainsaid that prosecutors

often do call before grand juries persons suspected of criminal activity . . . and the availability of this device has often been fatally tempting to those aware of its potential for abuse. There can be no doubt that sanctioning unfettered discretion in prosecutors to delay the seeking of criminal indictments pending the calling of criminal suspects before grand juries to be interrogated under conditions of judicial compulsion [to] evade its own constitutional restrictions on its powers by turning the grand jury into its agent.' . . ."

Finally, Mr. Justice Brennan asserts, at page 1790:

> "Given the inherent danger of subversion of the adversary system in the case of a putative defendant called to testify before a grand jury, and the peculiarly critical role of the Fifth Amendment privilege as the bulwark against such abuse, it is plainly obvious that some guidance by counsel is required. . . .
>
> * * *
>
> "Under such conditions it 'would indeed be strange were this Court' to hold that a putative defendant, called before a grand jury and interrogated concerning the substance of the crime for which he is in imminent danger of being criminally charged, is simply to be left to 'fend for himself.' . . ."

Recognition that petitioner has such rights would not require any dramatic innovation in the law

with respect to the rights of a Grand Jury witness. It would not require a determination that, in these special circumstances, a Grand Jury interrogation of petitioner is a critical stage of a criminal proceeding requiring the presence of counsel. Petitioner has not suggested that the government has any constitutional duty to furnish him with counsel or to permit counsel to be present at his interrogation before the Grand Jury. Rather, petitioner's prayer for relief rests upon the basic premise that the assistance of counsel in reviewing his prior Grand Jury testimony is, in the circumstances of this case, necessary in order to enable counsel whom he has employed to render him effective legal assistance in evaluating the propriety of the government's effort to compel him to testify before another Grand Jury and to enable him to make proper determinations with respect to the existence of his right to assert his privilege against self-incrimination and to make other important determinations in connection with the pending proceedings.

Finally, the novelty of the basic issue involved is a criterion which determines the appropriateness of mandamus. Schlagenhauf v. Holder, 379 U.S. 104 (1964). The issue involved—whether a court which has determined that a witness summoned to appear

before a Federal Grand Jury is entitled to review testimony given by him to a prior Grand Jury is compelled by considerations of Grand Jury secrecy to prohibit the witness's attorney from reviewing such prior testimony—is one which has never been decided at the appellate level by any court.

2. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE APPROPRIATE PROCEDURE TO OBTAIN REVIEW.

The Petition for Writ of Mandamus was denied by the United States Court of Appeals for the Third Circuit because of the court's conclusion that Judge Rosenberg's order of November 18, 1976, did not constitute a judicial usurpation of power and because it could recognize no other ground for granting the Petition. (Appendix A, p. 1a) In arriving at that conclusion, the court below specifically avoided the

merits of Judge Rosenberg's ruling.[5/] That denial of the Petition, without having first passed on the merits of the district court ruling and without providing an alternative to a contempt citation, conflicts with the position of the United States Court of Appeals for the Fourth Circuit in United States v. Hemphill, 369 F.2d 539 (4th Cir. 1966).

In Hemphill, the Secretary of Labor had commenced a proceeding in the United States District Court for the District of South Carolina against certain defendants for alleged failures to pay minimum and overtime wages to some employees. The Secretary objected to certain interrogatories which had been drafted by defendants on a claim of privilege, but the District Court overruled the objection.

5/ In denying the Petition, the Court of Appeals specifically stated:

> "1. Our ruling is not to be construed as a decision on the merits of the district court ruling, since we, of course, did not reach the merits."

Although the Secretary did not await a contempt citation, the Court of Appeals for the Fourth Circuit held that an alternative to submission to a contempt order ought to be available when the District Court's ruling is clearly erroneous. Accordingly, the court reviewed the decision below via a petition for writ of mandamus. The Court of Appeals for the Fourth Circuit said:

> "To compel the Secretary to appear in the District in response to the order to show cause why he should not be held in contempt would not provide an adequate legal remedy. If he should appear and should be held in contempt, the order holding him in contempt would be an appealable order permitting appellate review in this Court. Meanwhile, however, the Secretary would have been subject to sanctions in the District Court, including possible imprisonment. Despite the comparative promptness with which orders for release on bail or stays may be obtained, that is hardly an appropriate or adequate means for obtaining appellate review of a pre-trial order of dubious validity, or one that was clearly erroneous as we hold this one to have been."
>
> Id., at 543.

The Hemphill court continued,

> "We hold instead that any litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance

> to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful.
>
> * * *
>
> "When a pretrial order is clearly erroneous, an appellate corrective ought to be available if compliance with the order would work a substantial and irreparable deprivation or if the only alternative is submission to a contempt order."
>
> Id.

Had petitioner been before the United States Court of Appeals for the Fourth Circuit, his Petition would have been granted. That court would have reviewed the merits and, having found Judge Rosenberg's order of November 18, 1976, to be clearly erroneous, would have granted the Petition for a Writ of Mandamus, in order to avoid petitioner's appearance before the court to show cause why he should not be held in contempt. The Petition, however, was presented to the United States Court of Appeals for the Third Circuit, which held, without reaching the merits of the District Court's ruling, that petitioner had no alternative to a contempt citation.

This conflict between the Third and Fourth Circuits should be resolved by this Court with the grant of certiorari to review the decision below.

CONCLUSION

For the following reasons, a writ of certiorari should issue to review the order of the Court of Appeals for the Third Circuit.

Respectfully submitted,

GILBERT J. HELWIG
GERALD C. PARIS
REED SMITH SHAW & McCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for Petitioner

Date: January 21, 1977

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2506

IN RE GRAND JURY PROCEEDINGS
SUBPOENA OF EDWARD P. ZEMPRELLI

THE HONORABLE LOUIS ROSENBERG,
Nominal Respondent

Edward P. Zemprelli,
Petitioner

Present: SEITZ, Chief Judge, and VAN DUSEN and ADAMS,
Circuit Judges.

OPINION OF THE COURT
(Filed December 22, 1976)

PER CURIAM:

This Petition for a Writ of Mandamus requests us to direct the district court to vacate its order of November 18, 1976, which allowed a grand jury witness subject to a subpoena to review testimony given by him to a previous grand jury in December 1974, but denied his application that counsel for such

witness be given permission to review the transcript "without prejudice, . . . to the right of the witness to make such notes of the aforesaid testimony as the witness desires, and to disclose these notes to his counsel."

We have concluded that this is not an appropriate case for the issuance of a writ of mandamus, since the district court's action did not constitute a "judicial usurpation of power." Will v. United States, 389 U.S. 90, 95 (1967); Platt v. Minnesota Mining Co., 376 U.S. 240, 245 (1964). See also Schlesinger v. Teitelbaum, 475 F. 2d 137 (3d Cir.), cert. denied, 414 U.S. 1111 (1973); United States v. Grand Jury, 425 F. 2d 327 (5th Cir. 1970); Lampman v. United States District Court, etc., 418 F. 2d 215 (9th Cir. 1969), cert. denied, 397 U.S. 919 (1970).[1] Nor do we think that this is an appropriate case for issuance of a writ under any of the other recognized grounds for granting such extraordinary relief. See National Right to Work Legal Defense & Educational Foundation v. Richey, 510 F. 2d 1239 (D.C. Cir.), cert. denied, 422 U.S. 1008 (1975).

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1. Our ruling is not to be construed as a decision on the merits of the district court ruling, since we, of course, did not reach the merits.

The Petition for a Writ of Mandamus will be denied, our December 14, 1976, order staying the subpoena will be vacated, and the mandate shall issue forthwith.

TO THE CLERK:-

Please file the foregoing opinion.

_____
Circuit Judge

[Blank]

IN THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	)	
GRAND JURY PROCEEDINGS	)	Misc. No. 6631
EDWARD P. ZEMPRELLI, Witness	)	

AFFIDAVIT

James E. Roark, Assistant United States Attorney, Western District of Pennsylvania, being duly sworn, states as follows:

1. On December 13, 1976, counsel for Edward P. Zemprelli, by letter, requested "that in connection with [these] proceedings, [the Government] prepare for submission to the Court an affidavit of purpose (See Schofield I, 486 F.2d 85; In re Grand Jury Proceedings- Bruno, 3d Cir. Oct. 21, 1976) . . ."

2. The September 23, 1975, Grand Jury of the United States District Court for the Western District of Pennsylvania is now conducting investigations of various alleged illegal activities in the Western District of Pennsylvania. Investigations being conducted by the aforementioned Grand Jury involve possible violations of federal criminal statutes, including but not limited to Title 18, United States Code, Sections 371 (conspiracy), 1622 (subornation of

perjury), 1623 (false declarations), 1503 (obstruction of justice), 1951 (Hobbs Act) and 1952 (Interstate Transportation in Aid of Racketeering-bribery/ extortion).

3. Edward P. Zemprelli has been twice subpoenaed by the aforesaid Grand Jury and the government has not denied witness' protestations, made through counsel, during court proceedings relating to the witness' grand jury appearances, that he could be a potential defendant in this grand jury investigation.

4. It is essential and necessary to the aforesaid grand jury investigation that Edward P. Zemprelli appear and testify before the Grand Jury. Such testimony is essential and necessary to establish the relationship between Edward P. Zemprelli, Francis P. "Red" Long, John Hackett as it relates to conspiracy to obstruct justice (18 U.S.C. §371), obstruction of justice (18 U.S.C. §1503), perjury (18 U.S.C. §1623) and subornation of perjury (18 U.S.C. §1622).

5. Such testimony is essential and necessary further to establish whether or not Edward P. Zemprelli has received monies and other things of value by virtue of his position as State Senator for the Commonwealth of Pennsylvania in violation of Title 18, United States Code, Sections 1951 and 1952.

6. Such testimony is further essential and necessary to establish the relationships between

Edward P. Zemprelli, and certain banking interests and institutions and others related thereto to determine whether or not there have been violations of Title 18, United States Code, Sections 1951 and 1952.

JAMES E. ROARK
Assistant U.S. Attorney

Sworn and subscribed to this

_____ day of _____, 197_.

DEPUTY CLERK
U.S. DISTRICT COURT
FOR WESTERN DISTRICT OF
PENNSYLVANIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY PROCEEDINGS	)	
	)	
SUBPOENA OF	)	Miscellaneous No. 66-31
	)	
EDWARD F. ZEMPRELLI	)	

BEFORE: THE HONORABLE LOUIS ROSENBERG, J.

HEARING

WEDNESDAY, NOVEMBER 17, 1976
PITTSBURGH, PENNSYLVANIA

Reported by: Sandra D. Wenger
Court Reporter

MR. HELWIG: No, but for those reasons, let me say what we are asking for today and why.

We want the Court to order the United States Attorney to give Senator Zemprelli a copy of the transcript of it.

THE COURT: Well, Mr. Zemprelli is not refusing to testify as I understand it?

MR. HELWIG: Oh, no.

THE COURT: Unless it affects any of his constitutional rights, but that is not yet stated. What you want now, as I understand it, is for him to look at something that he may have said two years ago in a past grand jury, one that is no longer in existence?

MR. HELWIG: Right.

THE COURT: And that this record was

[6]

requested of the prosecution counsel and denied?

MR. HELWIG: Yes, Your Honor.

THE COURT: It was refused?

MR. HELWIG: It has — we have been advised that unless the Court orders it, the United States Attorney will not provide it.

THE COURT: Well, of course, the United States Attorney was right in refusing that without a Court order and without reason. Now, your

reason here today is that the past testimony before the grand jury might now be involved in the present inquiry by the grand jury of Mr. Zemprelli and he would like to be aware, or refresh his memory rather, of what had been said by him two years ago?

MR. HELWIG: That and in addition to have an opportunity for counsel to review it so that effective assistance of counsel can be given in connection with this matter.

THE COURT: I am not sure about counsel, but Mr. Zemprelli is entitled to it. I don't know about counsel, though, unless you would give me some very good authority and I, for the moment, am of the opinion that the law permits the disclosure to a witness of the grand jury but not to counsel.

MR. HELWIG: Well, the secrecy of the

[7]

grand jury would not be violated by a witness showing his own testimony to his counsel in connection with legal advise, Your Honor.

THE COURT: Well, that would mean the record would have to be disclosed. And if it is disclosed to counsel, it is a disclosure to a third party. The witness himself may consult with counsel, may indicate what was indicated, but let's hear from the Government counsel on this and see where we are. Maybe we're arguing something we ought not to

argue, but maybe there is reason for argument here. Is there?

MR. HELWIG: The only other thing, Your Honor, that we may have a disagreement about is if we are furnished this transcript, the United States attorney has indicated that we could still go forward this afternoon. We don't think that is adequate time to review it, Your Honor.

THE COURT: Well, I don't know. That would be prejudgment on my part, unless I know what the facts are.

MR. ROARK: Your Honor, let me just, as a matter of background and response to several things Mr. Helwig has said, state that Mr. Zemprelli did appear before a grand jury on December 18, 1974 concerning matters that that grand jury was investigating.

[8]

THE COURT: And it would have nothing to do if Mr. Zemprelli would not come before it?

MR. ROARK: That's correct, Your Honor. Now, that really is a summary of why we did refuse the request of Mr. Helwig to have the appearance continued, because it was the understanding made last — reached last Thursday or Friday between counsel for the Government and counsel for Mr. Zemprelli that were several dates

suggested. One was Wednesday, one was Thursday, and it was agreed upon at that time that an appearance at 1:30 today, November 17, would be met by Mr. Zemprelli.

Now, yesterday evening late, a request was made based upon the fact that Mr. Zemprelli had matters that had occurred recently that would prevent him from coming and the Government did refuse a further extension because it set aside a substantial block of time for Mr. Zemprelli's testimony before the grand jury.

THE COURT: Now, I will not inquire into any matters that are pending before the grand jury and will respect its secrecy and will not require you to indicate the subject matter for which Mr. Zemprelli is being subpoenaed. I will, however, ask several questions which will not affect the secrecy of the grand jury. Number one, will the questioning of [11] Mr. Zemprelli be longer than the afternoon and will it continue into tomorrow?

MR. ROARK: No, Your Honor. This is not anticipated.

THE COURT: In other words, the questioning will be completed as of this afternoon within the reasonable Court time?

MR. ROARK: That is correct.

THE COURT: Is it, as far as you are

counsel for the Government and attending to the grand jury procedure, is it a matter that Mr. Zemprelli should have his memory refreshed as to what had been stated two years ago?

MR. ROARK: His — the questioning today?

THE COURT: And I am not asking you for the subject matter.

MR. ROARK: Yes, it relates to matters of two years ago.

THE COURT: Of two years ago? Then he should see that testimony.

MR. ROARK: The Government, of course, was sensitive to the request since Rule 6E forbids it to disclose two points.

THE COURT: I understand and I know [12] the Court is with law.

MR. ROARK: But does that include — I understand that and I believe the Court's reasoning is probably based upon the fact that a person who appears before a grand jury may — is not —

THE COURT: Is permitted to discuss his testimony outside the grand jury. A person who appears before the grand jury and testifies before the grand jury is not held to any secretiveness. He may discuss that. The witness may discuss it with the world if he wishes. He cannot be compelled to

maintain secrecy like you or any of the officials who attend a grand jury or members of the grand jury. They are not privileged in any way to disclose or divulge any matter or processes which occur in the grand jury. And I am trying to preserve that.

But as far as the witness himself is concerned, he has a perfect right to tell it to the world and, most certainly, to his attorney. But if he now wants to refresh his memory on what he had testified to before, it is a perfect right. It is a constitutional right that he does have. He has a right to discuss that with his lawyer afterwards, but I do not see that his lawyer has the right to that transcript.

Now, how long will it take Mr. Zemprelli to [13] examine his testimony? How many pages?

MR. ROARK: The grand jury testimony is approximately sixty pages and I believe it is my recollection that the testimony of Mr. Zemprelli, though split between a late morning and early afternoon session, did not nearly reach the period of three hours that Mr. Helwig —

THE COURT: How many pages?

MR. ROARK: Sixty pages.

THE COURT: Mr. Zemprelli is a lawyer, is he not?

MR. ROARK: he is, Your Honor.

THE COURT: Mr. Zemprelli, as a lawyer, will be able to digest the contents of the transcript and be able to discuss it with counsel. And thereafter, he may come before the grand jury. And if it should happen or should appear in any way at all that there are matters which counsel decides, after discussion with his client, that there is need for further aid or remedy from the Court, he may approach the Court. But I don't believe that we ought to hold this off and let a grand jury who is being held or called for a particular purpose, and especially since there's been one continuance, I don't believe that we ought to hold them over until tomorrow on an extra day. These [14]

When I requested a postponement, if an alternative of coming Thursday was communicated by Mr. Roark to Mr. Griffith, it was not communicated to me.

Secondly, I would like respectfully to except to Your Honor's ruling to the extent that the suggestion, if it does, that Senator Zemprelli is precluded from showing the transcript to us, his counsel —

THE COURT: Well, you can take any exception you want to. You can object to all of it. There is nothing wrong with that. If I have not ruled properly, you know what to do. But don't tell me what you are going to do. I am doing it now.

[16]

MR. HELWIG: I understand, Your Honor. I merely wanted to —

THE COURT: Don't do me any favors. My ruling will stand, unless you can show that I am authoritatively wrong. And have you any authority to show that I am?

MR. HELWIG: I have not, Your Honor.

THE COURT: All right. Then it will stand.

Now, provide a place where Mr. Zemprelli may privately and leisurely be able to examine the record and indicate and absorb what is contained. There will

[16]

one other thing for the record. In response to Mr. Helwig's comments before receiving this subpoena Thursday morning, it is my understanding, and it is based on communication with the Marshall's Office, that Mr. Zemprelli was reached directly or indirectly through the Marshall's Office early in the week and arrangements were made to serve him with the subpoena last week after his return from Harrisburg.

THE COURT: Well, I don't want to hear anything about that. I am not concerned with that. I am concerned with the instant questions.

Mr. Helwig, there shouldn't be any problem here.

[21]

MR. HELWIG: I don't see any.

THE COURT: I am just leery of permitting any testimony, transcription of testimony go to anyone else other than the party, the witness himself. It is a little different whenever a witness testifies or is about to testify and the grand jury questions that witness. That witness does have the right to go out of the grand jury room and the grand jury may not hold him, nor may the prosecuting attorney in any way coerce him into believing he doesn't have a right to leave the jury room and go out and to consult with the attorney. He does have that right. And if he doesn't have that right, we would enforce it.

[21]

Now, the same thing here as of now, except on the question of disclosure of certain testimony or providing transcripts of certain testimony when the law does not provide for it. I would be very glad to let Mr. Zemprelli have a copy of it and let you have it, since I have known you a good many years. I know you are a good lawyer and I know your reputation. But that isn't the point. The point is I am trying to administer the law. Do you understand that?

MR. HELWIG: I understand, Your Honor.

THE COURT: So, let Mr. Zemprelli get the information. Let him make notes and make

[22]

whatever notes he wishes. Let him have all the time that he needs on it. And if he should happen to go into this afternoon, inform the Court and it may be that we'll postpone it until another day, until tomorrow, perhaps. But he should be given all the appropriate rights that he has, but no more. I can't give him any more than that. Do you understand that?

MR. HELWIG: Yes, sir, I understand.

THE COURT: Go ahead.

MR. HELWIG: Your Honor, the statement of the U.S. Attorney about an agreement being

[22]

[Blank]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY PROCEEDINGS	)	
	)	
SUBPOENA OF	)	Miscellaneous No.
	)	66-31
EDWARD P. ZEMPRELLI	)	

BEFORE: THE HONORABLE LOUIS ROSENBERG, J.

—

HEARING

WEDNESDAY, NOVEMBER 17, 1976
PITTSBURGH, PENNSYLVANIA

—

Reported by: Sandra D. Wenger
Court Reporter

—

of liking for him, but that does not prevent me in finding some criticism against his thinking as he reflected it in his memorandum. And that is that the grand jury's purpose is to find the trust and that it cannot be based on unrefreshable recollections or something similar to that. In my experience, I have found that when a witness goes on the stand, an honorable, honest, earnest witness goes on the stand and is asked to recollect what happened two years before, he finds a great deal of difficulty in doing it. And if he is not permitted, as we do permit under our rules of Court and as the evidence rules had permitted it to be done before, for him to be shown an exhibit and ask him whether or not that exhibit refreshed his memory, and if he says it does, to be able to testify afterwards to the truth of what he then says is a set of circumstances.

If he says it does not refresh his memory, it is, of course, not used. But it is not made evidence, that is the exhibit is not. And so, it is here is a witness who has come forward with some hazards, some jeopardy. As I take it, he's being called before the grand jury a second time. If he were here for the first time, it would present a different set of circumstances. Now, it is a second time. Counsel for the Government has indicated that there is some connection, I have not asked counsel what the

connection was nor have I asked counsel what the subject matter was since I did not want to know nor did I want anyone else to know what the subject matter of this particular grand jury's inquiry was to be, thus preserving its secrecy both of the past grand jury session and of this one as well.

And so, since it has some connection with it, my reasoning was that one witness before the grand jury should not be put in a worse position than one who is a witness in Court before a petit jury and not be permitted to refresh his memory as to what occurred or what he had said two years before. Honest witnesses, honest witnesses have time and again changed fromwhat the facts were of their testimony in a hearing two years before from what they said it was afterwards. I have seen this time and time and time again and it isn't right. It isn't fair that a witness should be deprived of his right to know what he said two years before and be able to recollect, to refresh his memory. And that was the purpose for which I allowed this witness now to attempt to ascertain or to recollect what it was that was said by him and under oath before the grand jury two years before.

If I didn't do that, I would, in good conscience, hold myself responsible for an injudicious act and I

certainly don't want to do that. Thus, it was that I did not help a defendant, a potential defendant, in the case. Nor did I help the Government make a potential defendant. I merely aided the grand jury to receive a witness who might speak the truth as he recollected it, as he recollected he had spoken it two years before.

When it came to the question of letting counsel for the witness see the transcript of the testimony, then it presented a different question. And gentlemen, I am going into this now a little more detailedly because you asked for a clarification. When I looked at that, I began thinking about the times when there could be disclosure of evidence under our rule. And when a time was needy, I think that is the word that is used, there have been all kinds of occasions in which it had been held that a disclosure of grand jury testimony should be permitted by the Court within its discretion because it was needy. And there are many cases in which it has been held that that need does not exist.

So, here I am in a position where I have to determine whether the need for counsel to look at the transcript of the testimony is equivalent to the right of a witness who must go in and refresh his memory, his recollection, so that he might be able to tell the truth before the jury. And it came to a close

parallel, as I told counsel earlier, that when a witness is called before a grand jury, he may not take his lawyer in with him. He is required to testify in his own behalf as a witness independently of what counsel may suggest. However, he is given the right to consult with his lawyer and to cause the grand jury to stand by until he goes outside and consults with his lawyer regarding his constituional rights, not regarding whether the direction he should take as to telling the truth or the untruth because we assume that lawyers will be honorable and will only stick to their job of telling their clients the law, and what the law is, and what their rights are as they face the grand jury.

And that being the case, I believe that a proper ruling here in parallel would be that counsel should not be able to see that transcript, but that there would be no harm in the witness who had seen the transcript, and who had refreshed his memory, and making notes, and I think I went pretty far on that, making notes in the same way that any wintess who appears before a grand jury, take his oath, make a dissertation on what he was telling the jury, and then come out and tell the whole world what he said because he is not confined to secrecy. Thus, it would be an aid of the memory of the witness of what he had refreshed his memory on of what he had

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE GRAND JURY PROCEEDINGS)
)
SUBPOENA OF EDWARD P. ZEMPRELLI)
) Misc. No. 6631,
) D.C.W.D. Pa.
THE HONORABLE LOUIS ROSENBERG,)
)
Nominal Respondent.)

PETITION FOR WRIT OF MANDAMUS

The petition of Edward P. Zemprelli, by his counsel, respectfully represents:

1. On Thursday, November 11, 1976, petitioner was served with a subpoena issued by the United States District Court for the Western District of Pennsylvania requiring his appearance before a Grand Jury presently sitting in said district on Friday, November 12, 1976. At the request of petitioner's counsel, representatives of the United States Attorney agreed to postpone petitioner's appearance before the Grand Jury until the afternoon of November 17, 1976.

2. Thereafter, upon review of the matters involved with counsel, petitioner has reason to

believe that he may be a target defendant in said Grand Jury proceedings and that said proceedings involve, at least to some substantial extent, matters concerning which he was subpoenaed and about which he testified before a prior Grand Jury in December, 1974.

3. Upon making said determination, petitioner filed an application with the United States District Court for the Western District of Pennsylvania seeking to have a copy of the transcript of his testimony given in December, 1974, made available to him and to his counsel for their review prior to his being required to appear in response to the summons served on November 11, 1976. Application was also made for a reasonable delay in the scheduled appearance of petitioner before the Grand Jury in order to permit an adequate review of said transcript by petitioner and his counsel.

4. Said motion was presented to the Honorable Louis Rosenberg, Judge of the United States District of Pennsylvania, on the morning of November 17, 1976. After hearing, Judge Rosenberg ruled that petitioner was entitled to review a copy of the transcript of his testimony given before the prior Grand Jury in December, 1974, but that petitioner's

counsel was precluded from reviewing said transcript by the requirements of secrecy which are applicable to Grand Jury proceedings. (Copy of Order and Transcript are attached hereto as Exhibit A.)

5. The Grand Jury before which petitioner testified in December, 1974, is no longer in session and no relevant consideration any longer exists for applying considerations of secrecy as a reason for denying petitioner's counsel the opportunity to review said transcript. Apart from this consideration, the review of said transcript by counsel for petitioner would not involve any violation of any applicable concept of secrecy and would be privileged.

6. Unless petitioner has a reasonable opportunity to review his testimony before the prior Grand Jury with counsel, petitioner's rights under the Fifth Amendment of the United States Constitution and petitioner's other Federal Constitutional rights may be jeopardized.

WHEREFORE, petitioner respectfully requests that this Court issue a Writ of Mandamus directed to the Honorable Louis Rosenberg and instructing him to vacate his ruling which prohibits petitioner's counsel from reviewing the transcript of petitioner's

testimony before the Grand Jury in December, 1974. Petitioner further requests the Court enter an Order staying all proceedings with respect to the summons compelling petitioner's appearance before the Grand Jury in December, 1974. Petitioner further requests the Court enter an Order staying all proceedings with respect to the summons compelling petitioner's appearance before the Grand Jury until the Court has an opportunity to consider and rule upon this application for Writ of Mandamus.

Respectfully submitted,

/s/ Gilbert J. Helwig
Gilbert J. Helwig

/s/ Gerald C. Paris
Gerald C. Paris
REED SMITH SHAW & McCLAY
Union Trust Building
Pittsburgh, Pennsylvania 15219

CERTIFICATE OF SERVICE

I certify that a copy of the attached Petition for Writ of Mandamus was served on the United States Attorney by delivering a copy of the office of Assistant United States Attorney James E. Roark, 21st Floor, United States Post Office & Courthouse, Grant Street, Pittsburgh, Pennsylvania 15219, on November 17, 1976.

/s/ Gilbert J. Helwig
Gilbert J. Helwig
REED SMITH SHAW & McCLAY
Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for Edward P. Zemprelli

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

BEFORE ME, a Notary Public in and for said Commonwealth and County, personally appeared EDWARD P. ZEMPRELLI, who, being duly sworn according to law, deposes and says that the statements of fact contained in the foregoing Petition for Writ of Mandamus are true and correct to the best of his knowledge, information and belief.

/s/Edward P. Zemprelli

Sworn to and subscribed
before me this 17th day
of November, 1976.

/s/ Nan Naffah
Notary Public

My Commission Expires: May 15, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

IN RE GRAND JURY PROCEEDINGS)
) Misc. No. 6631
SUBPOENA OF EDWARD P. ZEMPRELLI)

ORDER

Upon consideration of the motion of Edward P. Zemprelli for an order requiring that a copy of the transcript of his testimony before a Grand Jury in this District in December, 1974 bbe made available to him and to his counsel for their review prior to his being required to appear before a Grand Jury presently sitting in this District, and after hearing counsel with respect to such motion,

It is ordered, adjudged and decreed:

1. The motion that the witness Zemprelli be allowed to review the transcript of his testimony is granted; and

2. The motion that the counsel for the witness be permitted to review the transcript is denied, without prejudice, however, to the right of the witness to make such notes of the aforesaid testimony as the witness desires, and to disclose these notes to his counsel.

/s/ Louis Rosenberg
J.

November 18th, 1976.